Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

James S. Smith and Barbara Smith,
Petitioners,

v.

The City of Cumming, a Municipal Corporation, Earl A. Singletary and John Doe,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

The Petitioners herein are the owners of a small TV repair shop located in Cumming, Georgia. Although there was no evidence that either Petitioner was engaged in any illegal activities, the police chief decided that he wanted to revoke the Petitioners' business license. The chief then proceeded to encourage customers to make complaints through the magistrate court and/or to city hall. The word was spread that Petitioner James Smith was a drug dealer.

During this period, Petitioner James Smith was attempting to videotape evidence of police misconduct and/or corruption by members of the City of Cumming, Georgia, police department. The Petitioner James Smith was brought before a magistrate on a warrant application that contained materially false allegations made by the Chief of Police Singletary. Petitioner Smith was threatened that if he photographed or videotaped any other police officers of the City of Cumming he would be held without bond in the city jail for a long and undeterminable period of time. Because of these threats, Petitioner ceased all efforts to obtain the evidence of police corruption.

Based upon these actions and several other acts by the police department, the Petitioners brought suit pursuant to 42 U.S.C.A. § 1983. The lower court granted summary judgment to Respondents. The Eleventh Circuit ruled that the Petitioners' First Amendment

Rights were violated, but that the Petitioners had suffered no damages. The questions presented here are:

a. Whether police can determine, without any evidence of Petitioners committing any crime, that a legitimate business is not wanted in the community and can take active steps to intervene in civil disputes and encourage civil complaints in order to have the business license revoked?

b. Whether law enforcement officers may cloak themselves with immunity for violation of free speech through the use of a magistrate to restrain the free speech?

c. Whether the use of the threat of imprisonment without bond, thereby stopping free speech, is a violation of Petitioners' constitutional rights in and of itself?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) the following is a list of all parties to the proceedings:

James S. Smith, Petitioner
Barbara Smith, Petitioner
The City of Cumming, a municipal corporation of the State of Georgia, Respondent
Earl A. Singletary, Respondent

Pursuant to Rule 29.6, counsel states that there is no publicly held corporation or parent corporation in this proceeding.

CITATIONS ENTERED BY THE COURTS BELOW

Smith v. City of Cumming, et al
United States Court of Appeals for the Eleventh Circuit, No. 99-8199, (May 31, 2000)

Smith v. City of Cumming, et al
United States District Court for the Northern District of Georgia

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PETITION FOR WRIT OF CERTIORARI

James S. Smith and Barbara Smith respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 31, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is a published opinion. It is reprinted in the Appendix hereto at page 1.

The opinion of the United States District Court for the Northern District of Georgia that gave rise to the appeal to the United States Court of Appeals for the Eleventh Circuit is a published opinion. It is reprinted in the Appendix hereto at page 5.

JURISDICTION

On January 12, 1999, the United States District Court for the Northern District of Georgia, Atlanta Division, entered an order granting summary judgment to Respondents and a final judgment was issued by the court on that same date.

Petitioners timely appealed to the United States Court of Appeals for the Eleventh Circuit.

On May 31, 2000, the United States Court of Appeals for the Eleventh Circuit issued a published opinion holding that the Petitioners' First Amendment Rights were violated but affirming the lower court's granting of summary judgment to Respondents, finding that Petitioners had suffered no damages.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED IN THIS CASE

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

42 U.S.C. § 1983

STATEMENT OF THE CASE

Suit was initially filed in the United States District Court for the Northern District of Georgia, Atlanta Division, for alleged violations of the Petitioners' federally guaranteed constitutional rights pursuant to 42 U.S.C. § 1983. Federal jurisdiction is pursuant to 29 U.S.C. § 1331.

The Petitioners own and operate a small electronics repair shop in the city of Cumming,

Georgia. They do business as DeCuff Electronics, Inc.

Cumming is a small city located approximately 40 miles north of Atlanta, Georgia.

The shop has been in Cumming for approximately 8 years, and does primarily TV and VCR repairs. (Deposition of James Smith, p. 9, ll. 15-17) The first few years the shop was operated successfully and with no unusual occurrences until 1995.

In 1995, the chief of police for the City of Cumming decided that Petitioners and their small shop should be run out of town. At that time the police department had two chiefs of police, Respondent Singletary and "Buck" Jones.

Despite having no evidence of the Smiths being involved in any illegal activities, Chief Jones, while acting as Chief of Police for the City of Cumming, intentionally injected himself into civil disputes between the Smiths and a few dissatisfied customers. (Deposition of Jones, p. 46, ll. 3-16). The Respondents contend that the Smiths were paranoid and extremely hostile business owners with hundreds of complaints, justifying police action. However, the Respondents have only been able to produce four disgruntled customers out of an eight-year period with over a thousand customers. This is hardly a bad business and a hostile person.

By Chief Jones' own admission, Jones had no evidence to believe that the City of Cumming would be better off if the Smiths packed up and

left. (Deposition of Jones, p. 55, ll. 6-11). Yet, despite the fact that Jones had no evidence of any criminal activity, Jones used these civil complaints as part of his effort to have the city withdraw the Petitioners' business license.

As part of his effort, he (Jones) tried to get as many complaints against the Smiths as possible, feeling that, if he could get enough complaints, he could then go before the mayor and city council and get their business license pulled--even though all of these were civil complaints. (Deposition of Jones, p. 56, ll. 1-14).

By Jones' own admission, there had not been a civil complaint, to his knowledge, since he took over as Chief of Police. (Deposition of Jones, p. 57, ll. 14-17). Yet Jones used his position as chief of police to contact anyone he felt might have a complaint against the Petitioners in order to instigate more civil or criminal complaints. He would tell these people that the police had an ongoing problem with the Smiths. One of the ones Jones contacted was a private investigator hired by the Petitioners. Jones identified himself as the chief of police and tried to get the investigator to give him any information that he (Jones) could use to get the Smiths' business license revoked. (Deposition of Villines p. 17, ll 9-25; p. 18, ll 18-25)

As part of Jones' effort to have the business license revoked, he ran a background check on the Smiths through the NCIC (National Crime Information Center). To do this, he used

the office of the Sheriff of Forsyth County because at that time the city of Cumming was not set up to have direct access. (Deposition of Jones, pp. 58, 59, 60). During his deposition, Jones admitted that the NCIC check was only supposed to be used in a criminal investigation. (Deposition of Jones, p. 60, ll. 2-8). Thus, Jones knowingly violated established federal and state regulations and laws concerning the use of NCIC to make an improper background check on the Petitioners without any justification or probable cause. Some of the information was subsequently used by Respondents' counsel in the deposition of Petitioners.

During this same period rumors began to circulate that the Petitioners were major drug dealers. The source of these rumors appeared to be police and in particular Jones and Singletary.

During the time that Jones was actively trying to encourage people to make complaints against the Smiths, an incident occurred between Mrs. Smith and an officer, Vince Elzey, of the Cumming Police Department.

Barbara Smith was going home after working late one night when she was pulled over by Officer Elzey. The probable cause given by Elsey was that she was "weaving." Mrs. Smith denied any wrongdoing and contends that it was part of the on-going harassment and/or part of a scheme whereby Cumming police officers would, under false pretext, pull over drivers and write bogus tickets in order to increase revenue. This was a matter that had been the subject of conversation among members of the legal

community and other citizens within the city of Cumming ever since Singletary took over as Chief of Police. (Deposition of Deborah Moseley, [a candidate for magistrate judge] p. 22, ll. 4-10; p. 35, ll. 1-8; p. 43, ll. 18-25).

James Smith decided to try to obtain evidence of this alleged improper stopping of vehicles by the police. In order to do this, he used a police scanner and a video camera. Petitioner would randomly follow police cruisers, videotaping them. If they performed a stop, he would videotape the traffic stop. At no time did Petitioner ever interfere with any actions of a police officer, trespass on private property or approach within a sufficient area to cause any fear or interference with police officers. At all times, his videotaping was done from public property. (Deposition of James Smith, p. 91, ll. 24-25; p. 92, ll. 1-7.)

Respondent Singletary approached the magistrate of Forsyth County, Jerry Adams, and swore out an application for an arrest warrant for the videotaping of his police officers. Singletary alleged that the actions of the Petitioner constituted Obstruction of an Officer. Respondent Singletary then proceeded to intimidate and embarrass Petitioner and his wife by charging into the Petitioners' place of business accompanied by multiple police officers and openly stating that the Petitioner James Smith had to come with them to appear in court to answer these charges.

Petitioner Smith was not in the shop at the time of the raid, so instructions were left for

him to report to the magistrate's office as soon as he came in from the service call he was on. Approximately an hour later, Petitioner returned from the service call, and he immediately went to the magistrate's office.

A hearing was then held before the magistrate. Petitioner appeared without benefit of counsel. No recording was made of the criminal proceedings.

Even though it is undisputed that Petitioner committed no criminal act, at the conclusion of the proceedings, the Petitioner was threatened that, if he videotaped police officers performing their job again, he was going to be placed in jail and held without bond for an undetermined period. (Deposition of James Smith, p. 231, ll. 12-18.) It should also be noted that, according to the testimony of Officer Elzey, the affidavit given by the Respondent Singletary, under oath, is false and was known to be false by Singletary at the time he made the affidavit.

Elzey testified that he did not discuss James Smith with Respondent Singletary prior to the hearing, nor did he request that Singletary take any action to stop Smith. (Deposition of Elzey pp. 33-36)

Because of the threat of imprisonment without bond, Petitioners ceased all their efforts to try to obtain the evidence of corruption.

REASONS FOR GRANTING THE WRIT

I. Whether police can determine, without any evidence of Petitioners committing any crime, that a legitimate business is not wanted in the community and can take active steps to intervene in civil disputes and to encourage civil complaints in order to have the business license revoked?

While it is a legitimate police function to investigate crimes and keep track of known criminals, citizens are guaranteed under the First and Fourth Amendments to the Constitution freedom of association and freedom from unreasonable search and seizure.

The constitutional right to privacy first articulated in Griswold v. Connecticut, 381 US 479 (1965) has been expanded to cover a range of personal rights under the First, Fourth, Ninth, and Fourteenth Amendments. Privacy is a paramount Fourth Amendment concern and the prohibition against unreasonable searches and seizures protects against unjustified invasion of privacy. Katz v. United States, 389 US 347 (1967) The Constitution also protects to some extent "the individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 US 589, 599 n.24 (1977).

In the case *sub judice*, the Petitioners had a well recognized right to be allowed to run their business without the interference of the Cumming police department. They had a right not to have the chief of police violate federal and state regulations to obtain an NCIC report

for the express purpose of using any information therein to revoke the Smiths' business license over four civil disputes. They had a right not to have the chief of police injecting himself in civil matters between the Smiths and their customers in such a way as to aide the customers, and to discredit the Smiths.

II. Whether law enforcement officers may cloak themselves with immunity for violation of free speech through the use of a magistrate to restrain the free speech?

The District Court held that by applying to the magistrate for a warrant, the Respondents took the correct action and were acting properly. The District Court further held that Respondent Singletary's actions were covered by qualified immunity.

The magistrate would be immune from liability because of judicial immunity, and is therefore not a party to this suit.

In granting the summary judgment, the District Court did not address the fact that the affidavit executed by Singletary contained false information. Nor did the Court address the fact that holding a citizen without bond when he has not committed any crime was a wanton deprivation of the petitioner's constitutional rights.

As to the First Amendment claim under Section 1983, the Smiths had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather

information about what public officials do on public property, and specifically, a right to record matters of public interest. See Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interests in filming public meetings is protected by the First Amendment); Fordyce v. City of Seattle, 55 F. 3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); Iacobucci v. Boulter, No. CIV. A. 94-10531 (D. Mass, Mar. 26, 1997) (unpublished opinion) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings); see also, United States v. Hastings, 695 F. 2d 1278, 1281 (11th Cir. 1983) (finding that the press generally has no right to information superior to that of the general public) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[I]t is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . . ."); Thompson v. City of Clio, 765 F. Supp. 1066, 1070-71 (M.D. Ala. 1991) (finding that city council's ban on member's attempt to record proceedings regulated conduct protected by the First Amendment); cf. Williamson v. Mills, 65 F. 3d 155 (11th Cir. 1995) (reversing district court's grant of qualified immunity to a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers).

The Court of Appeals acknowledged that Petitioners had a First Amendment right to photograph police, but held that, under Section 1983, the Smiths must prove that the conduct complained of deprived them of "a right, privilege or immunity secured by the constitution or laws of the United States." Nail v. Community Action Agency of Calhoun County, 805 F. 2d 1500, 1501 (11th Cir. 1986). Although the Smiths have a right to videotape police activities, they have not shown that the Defendants' actions violated that right.

In this case, the Petitioners were stopped from their protected activity by a false affidavit from Singletary and an unconstitutional threat by Singletary and the magistrate. Through the use of fear and intimidation, the Respondent violated the Petitioners' rights.

Especially on summary judgment, the District court should not have acted as a trier of the credibility of the witnesses. Nor should qualified immunity be given for a clear violation of constitutional rights merely because a magistrate is a party to the unconstitutional acts.

III. Whether the use of the threat of imprisonment without bond, thereby stopping free speech, is a violation of Petitioners' constitutional rights in and of itself?

As set forth in the preceding portion of this Petition, the Petitioners had a First Amendment right to take the videos of the police. However, the appellate court found that while this activity was protected free speech,

that the Petitioners had not shown that their rights had been violated. Respectfully, Petitioners suggest that the appellate court was wrong.

It is undisputed that Petitioners were actively engaged in trying to obtain proof of either police misconduct or police corruption. It is also undisputed that the threats of the police and the magistrate forced the Petitioners to stop this activity.

Actions by the police which interfere with the free exercise of speech, press, and association or which interfere with religious liberties guaranteed by the First Amendment are subject to suit under 42 USC 1983. Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) Furthermore, Law enforcement activities designed to retaliate against persons for criticizing government officials, or filing lawsuits against them, violates the First Amendment. This is true whether the action is an immediate arrest, a later prosecution, or other adverse action. Mackinney v. Nielsen, 69 F.3d 1002, 1007 (9th Cir. 1995); Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990)

Singletary's actions of bringing a group of armed police officers into Petitioners' place of business, and threatening criminal prosecution for the exercise of Petitioners' First Amendment right, did exactly what Singletary intended his actions to do. Singletary stopped not only Petitioners from gathering evidence, but it also sent a clear message to other members of this small town as to what happens

to anyone who tries to obtain evidence against the police officers.

When Petitioners were frightened into stopping their videotaping by the actions of Singletary and the magistrate, their constitutional rights were violated.

CONCLUSION

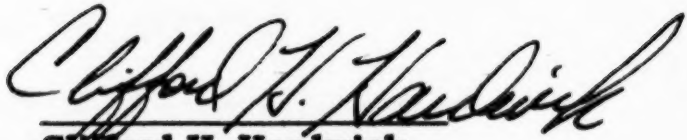
The District Court and the Eleventh Circuit erred in holding that the Petitioners constitutional rights were not violated, and that Singletary was entitled to qualified immunity.

Before granting summary judgment, the District Court should have addressed the issue of false swearing in the affidavit and the clearly unconstitutional threats used against the Petitioner to stop his efforts to obtain evidence of police misconduct.

Because of the importance of citizens efforts to become involved in monitoring the actions of local police departments, the opportunity for abuse of authority in small towns, and the importance of citizens' rights to be free from unconstitutional interference from police, Petitioners respectfully pray that the Supreme Court grant their Petition.

(Signature on following page)

Respectfully submitted,



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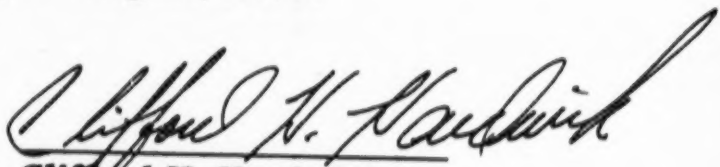
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondents with three true copies of the foregoing Petition for Writ of Certiorari by depositing same in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

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This the 25th day of August, 2000.



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